

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

WEDNESDAY, THE 7TH FEBRUARY 2007 / 18TH MAGHA 1928

FAO.No. 63 of 2003()

AS.201/1995 of SUB COURT, TIRUR
OS.382/1990 of MUNSIFF'S COURT, PARAPPANANGADI
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APPELLANT/RESPONDENT/DEFENDANT

MUKRI VEETIL KUNHIMOIDEEN, S/O. KASMI,
A.R.NAGAR AMSOM, TIRUR TALUK.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS: APPELLANT/PLAINTIFF

ALUNGAL KARALTH POCKER HAJI,
S/O. MOIDEEN, A.R.NAGAR AMSOM,
MAMBURAM DESOM, TIRUR TALUK.

BY ADV. SRI.K.P.DANDAPANI

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 02/02/2007, THE COURT ON 07/02/2007 DELIVERED THE
FOLLOWING:

ORDER ON I.A.NO.852/2003 IN FAO.63/2003

DISMISSED

07/02/2007

Sd/- P.R.RAMAN, JUDGE.

P.R.RAMAN, J.

F.A.O.NO.63 OF 2003

Dated this the day of February, 2007

JUDGMENT

This is an appeal against the decree and judgment dated 11/4/2003 in A.S.No.201/95 on the file of the Subordinate Judge's Court, Tirur. The defendant in the suit O.S.No.382/90 is the appellant herein. The suit is one for permanent prohibitory injunction. According to the plaint averment, the plaint schedule property belonged to the plaintiff who got it as per the registered partition deed dated 9/4/1987 and he is an executant No.1 in the partition deed and the plaint schedule property is item No.4. The defendant's property is lying on the north of the said property. Both properties are lying in different survey numbers. Plaintiff was

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residing away from the plaint schedule property. While so, one year back, the defendant demolished the entire stone wall and when the plaintiff came to know about the same, he was told that the demolition of the wall was for the purpose of re-construction with granite stones. The defendant in November, 1990 made an attempt to trespass into the plaint schedule property and to demolish the fence. It is prayed that the suit may be decreed granting permanent injunction restraining the defendant and his men from trespassing upon the plaint schedule property and from demolishing the fence and from altering the nature of the boundary of the plaint schedule property and interfering with the peaceful possession of the plaintiff over plaint schedule property.

2. The defendant contended that the

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measurement, extent and resurvey number and name of the plaint schedule property are not correct. The plaint schedule property has never been in the possession of the plaintiff. There is only a mention about the partition deed in the plaint and there is no reference of the back document. The partition deed is the one where certain portion of the southern property is also included and therefore, plaintiff has no right over it. The property lying in R.S.Nos.202/5 and 202/3 is in possession of the defendant and the plaintiff has no possession or title over the same. According to the defendant, he has got assignment of the property from Moideenkutty as per document No.1848 dated 5/7/1968 and when the defendant's father died, the legal heirs including the defendant partitioned the property as per partition deed of the year

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1978. Thus, as per these documents, the property came to be in possession of the defendant. The suit is liable to be dismissed.

3. The trial court framed necessary issues. PWs.1 and 2 were examined on the side of the plaintiff and Dws.1 and 2 were examined on the side of the defendant and Exts. A1 to A16, B1 to B6, C1 to C11 and X1 were also marked. The trial court found on an analysis of the evidence that the plaintiff has no title or possession over the items blocked in R.S.No.202/5. Though the plaint was got amended altering the extent of the property, middle measurements were not amended. Since the plaintiff has not proved that he is in possession of the property, the question of threat of trespass and demolition does not arise and the suit was dismissed.

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4. The Appellate Court found that the judgment of the Munsiff's Court shows that only the survey number of the property was taken into consideration by it in deciding the question of identity of the property described in the plaint schedule and possession of the plaintiff over that property. The trial court did not take into consideration Exts.C1 to C11 reports and plans filed by the Commissioner in deciding the question of identity of the property. Thus the lower court has totally ignored the reports and plans filed by the Commissioner. It was the specific finding that the trial court has not examined whether the identity of the property described in the plaint schedule can be decided on the basis of the reports and plans filed by the Commissioner. In the result, the appeal was allowed setting aside the judgment and decree

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of the lower court and the suit was remanded to the Munsiff's Court for fresh disposal. There was a further observation that the parties are at liberty to adduce additional evidence before the lower court.

5. It is contended by the learned counsel for the appellant that neither party has sought to adduce any additional evidence nor the plaintiff had a case that opportunity was not afforded to adduce any evidence. Further the finding of the Appellate Court is merely based on the non-consideration of the reports which were already on file and for that purpose remand was unjustified. The learned counsel for the respondent on the other hand would contend that in case the order of remand is not sustained, he will lose an opportunity to have the matter considered on merits both by the trial court and thereafter by the

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Appellate Court.

6. Heard both sides.

7. This is a case where both parties have adduced evidence on their satisfaction and the commission reports and plans Exts.C1 to C11 were also filed. It was after considering the materials on record that the Munsiff's Court disposed of the matter. When the reports and plans of the Commissioner were not considered by the trial court, the Appellate Court could have very well considered those evidence also and rendered a decision rather than remanding the matter for that purpose. In the absence of any prayer or contention that sufficient opportunity was not given, the question of granting further opportunity did not arise. The suit is of the year 1990. More than 16 years have elapsed and it will not be in the interest of parties again to remand the case

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to the trial court for the purpose of considering the Commission reports and plans. Since these materials are already on record, the Appellate Court ought to have considered these materials also and rendered its decision on merits. Merely for the purpose of considering the Commission reports and plans, a remand would be unjustified, as it will only delay the process of final adjudication.

8. In the result, the appeal is allowed. The matter is remanded to the Appellate Court for fresh consideration in accordance with law and subject to what is stated above.

P . R . RAMAN ,
Judge .

kcv.

